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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARSHALL P. SAFIR,

Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, UNITED STATES LINES, INC., Debtor, and S.S. AMERICAN LANCER, S.S. AMERICAN AQUARIUS, S.S., AMERICAN APOLLO, S.S. AMERICAN LYNX and S.S. AMERICAN ASTRONAUT, their engines, tackles, apparels, furnishings, equipment and appurtenances, in rem,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 27, 1990

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58

QUESTIONS PRESENTED

Whether a maritime claim for unjust enrichment which arose out of a breach of an Operating Differential Subsidy Contract authorized under the Merchant Marine Act of 1936 (46 U.S.C. §1171 *et seq.*) attains the status of a maritime lien for a shipowner, the intended third party beneficiary of a protective covenant of that contract, when vessels, manned with officers and seamen receiving wage subsidies, and vessels receiving subsidies for insurance, maintenance, and repair ("necessaries" under 46 U.S.C. §971) were utilized in predatory practices barred by the contract and were found to have destroyed the business and property of that unsubsidized vessel operator.

Whether an appeal of the denial of intervention in an admiralty proceeding is a statutory right despite lack of certification under Rule 54(b) of the Federal Rules of Civil Procedures where the case falls within the scope of the exception for interlocutory orders of such finality in 28 U.S.C. §1292(a)(3).

Whether the doctrine of laches can be a successful defense under the Ship Mortgage Act of 1920 as amended (46 U.S.C. §911 *et seq.*) when the parties to the mortgages under §953 were in prima facie violation of the good faith clause in §922 as to the existence of the prior lien for unjust enrichment on the vessels.

Whether the unification of the admiralty rules into the Federal Rules of Civil Procedure in 1966 and the movement of most of the Circuit Courts in the direction of general equitable jurisdiction for the admiralty courts has now made it desirable for this Court to declare the complete equity should be available to all manner and nature of claims submitted in admiralty.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Order of the Court of Appeals in Docket CA-90-7239 of April 4, 1990 denying leave to appeal (1a-2a) The Endorsed Memorandum of the District Court of January 30, 1990 is (3a). The Order of the District Court S.D.N.Y. of July 14, 1989 (4a). Other relevant opinions include *Safir v. U.S. Lines*

et al., 792 F.2d 19 (2nd Cir. 1986) *cert. denied*, 479 U.S. 1099 (1987); *Safir v. United States Lines et al.*, 616 F.Supp. 613 (EDNY 1985); *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983) *cert. denied*, 467 U.S. 1206 (1984) *rehearing denied*, 467 U.S. 1268 (1984); *Safir v. Klutznick*, 526 F.Supp. 921 (D.D.C. 1981). *In Re Marshall P. Safir*, 108 S.Ct. 496 (1987); *In Re Marshall P. Safir*, 108 S.Ct. 788 (1988). *Safir v. ICC & CSX Corp.*, 831 F.2d 283 (2nd Cir. 1987) *cert. denied*, 109 S.Ct. 520 (1988) and *Safir v. Gibson*, 330 F.Supp. 225 (EDNY 1971).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment below was entered on April 4, 1990.

STATUTES

28 U.S.C. § 1292(a)(3)
46 U.S.C. § 922(a)(3(, § 924, § 924, § 941
46 U.S.C. § 953(a)(1) & (2)
46 U.S.C. § 971

STATEMENT OF THE CASE

On February 20, 1990, this Court had denied a petition for certiorari in the above entitled case in Docket 89-953. Whether the case was ripe for review at that time was unclear. The Clerk of this Court had questioned whether the Second Circuit Order of September 20, 1989 in its Docket CA 89-8076 denying leave to appeal (which formed the basis of Docket 89-953) was final.

A motion for clarification to the Second Circuit of this point was outstanding when time under this Court's Rules (then Rule 12, now Rule 13) might have been determined to have tolled

as of December 18, 1989. The petition was thus protectively filed on December 18, 1989. Subsequent to the filing two events occurred when the petition was *sub-judice*. On January 5, 1990, the Court of Appeals rejected the motion for clarification of the September 20, 1989 Order, followed on January 30, 1990 by the Endorsed Memorandum by the District Court to its original order of July 20, 1989 denying leave to take an interlocutory appeal of the rejection of intervention in the admiralty proceeding.

The Endorsed Memorandum was the belated but necessary final order for purposes of appeal, or the interlocutory order well within the scope of the exception to the final judgment rule for interlocutory decress determining the rights and liabilities of parties to admiralty cases. Petitioner appealed under 28 U.S.C. §1292(a)(3) and moved for a stay pending appeal of any action by the district court to dismiss the proceeding below as there was every reason to believe that dismissal of the proceeding would render the appeal moot. *Alyeska Pipeline Service Inc. v. Vessel Bay Ridge*, 703 F.2d 381, 384-386 (9th Cir. 1983) cert. dismissed, 467 U.S. 1247 (1984)). The Second Circuit denied leave to appeal. Nevertheless, the concern felt by the petitioner as expressed in dissent by Justice Kennedy (as Circuit Judge) in *Alyeska* was allayed by the maintainance of jurisdiction for review under the exception to termination where the *res* or its proceeds were released "accidentally, fraudulently or improperly." The *Rio Grande v. Otis*, 90 U.S. 458, 465 (1874).[1]

[1]The proceeding has not been dismissed because an order granting a priming maritime lien for seamens' vacation pay has been reargued and remains *sub judice* as this petition is filed.

This petition is the outgrowth of the denial by the District Court for the Southern District of New York (Richard Owen, J.) of leave to intervene in an ongoing proceeding in admiralty. The proceeding was instituted by Prudential Insurance Co. of America to foreclose a first preferred fleet mortgage on 5 vessels of the defunct United States Lines Inc., a debtor in possession. In May 1987, the bankrupty court lifted the automatic stay to pursue arrest and foreclosure of these vessels, then in New York harbor. Three additional vessels were then arrested in San Francisco harbor and they were subjected to similar action there .

At the bankrupty proceeding Prudential contended that it possessed a first preferred ship mortgage on the eight vessels (Lancers) securing an outstanding balance of $92,885,000. In lifting the stay the bankruptcy court did not, however, allow Prudential to retain the proceeds of the sale until, in March 1988, Prudential and the debtor reached an agreement by which the debtor abandoned its opposition to Prudential's claim in exchange for 17.5% of the amounts Prudential would receive from the sale of the Lancers. The bankrupty court approved the settlement. See *Prudential Insurance v. S.S. American Lancer, et al., Gen'l Electric Capital Corp.*, Claimant Appellant, 870 F.2d 867, 870 (2nd Cir. 1989).

Petitioner, by the terms of a district court injunction against him was restrained from taking any action to pursue his own claim in bankruptcy court without district court leave. This was denied on May 12, 1989 by the Eastern District of New York District Court. Leave to intervene in the *Prudential v. General Electric* appeal for purpose of filing an amicus brief was denied by the Second Circuit in December 1988. Nevertheless, as soon as the mandate issued in *Prudential v. Lancer, supra*, in May 1989, Safir moved for leave to intervene in the admiralty proceeding in the district court. This was made possi-

ble for the belated acknowledgment of the modification by the District Court for the Eastern District of New York of the 1985 injunction against the petitioner. This modification had been decided by the Second Circuit on May 27, 1986. *Safir v. U.S. Lines, et al.*, 792 F.2d 19, 25 (1986), *cert. denied*, 479 U.S. 1099 (1987). The modification lifted the injunction to permit anew a meritorious claim in federal district court. Bankrupty court intervention without leave of the District Court remained foreclosed by the terms of the injunction despite an effort to lift it.

The admiralty proceeding had been stalled by the interlocutory General Electric appeal of the admiralty court rejection of the "decimal point" controversy described in *Prudential v. S.S. American Lancer, supra*. The vessels had already been sold but the proceeds of all eight Lancers ($65,000,000) were being held *in custodia legis* in New York and San Franciso. Petitioner's verified complaint informed the Court that his maritime claim against the vessels was in fact a maritime contract lien which arose prior to the recording and endorsement of the Prudential mortgage and thus preferred over that fleet mortgage under the Ship Mortgage Act of 1920 as amended (SMA). 46 U.S.C. §953(a)(1); that the lien was also for wages improperly advanced under §953(a)(2). By affidavit in support of his motion to intervene, petitioner set forth the nature of his claim both as a lien in quasi-contract and as an equitable claim for constructive trust. The affidavit is appended (A 24a to A 31a)

There was no coincidence in the fact that the date of the recording and endorsement of the Prudential mortgage (incorporating in haste the decimal point error) was the day the Second Circuit modified the Safir injunction May 27, 1986.

On March 6, 1986, Haight Gardner Poor and Havens, counsel for U.S. Lines and Moore McCormack (U.S. Lines,

S.A.) in the Safir litigation since 1984 had entered into an agreement with Prudential as well, to provide legal services to Prudential in connection with the restructuring of U.S. Lines and U.S. Lines, S.A. Gilmartin Poster and Shafto also represented Prudential. These two firms have been interchangable in representing Prudential and U.S. Lines before and since the U.S. Lines bankruptcy. There was no doubt early in 1986 that U.S. Lines was insolvent. There was insolvency in fact at the time that the mortgage was being restructured. U.S. Lines had admitted to the inability to service its debt.

The U.S. Lines predicament is discussed in some detail in *Prudential v. S.S. American Lancer, supra*, p. 869-870, by Circuit Judge Winter. It was clear that the restructuring of the ship mortgages including that of the Lancers, the Econ Ships and other classes was being undertaken not under fear of junior creditors in bankruptcy but as the means of avoiding the Safir claim returned as of May 27, 1986 to viability. Both the mortgagor U.S. Lines and the mortgagee Prudential, through counsel knew that the Second Circuit modification did not foreclose restatement of the claim in admiralty as one for unjust enrichment arising out of a maritime contract which primed the Prudential mortgage from its inception under the doctrine of *Archawski v. Hanioti*, 350 U.S. 532 (1956).

Prudential and U.S. Lines nevertheless depended on the maintenance of sufficient injunctive restraint to deny access to the admiralty proceeding during the period normally required to accomplish the ship sales, distribution of the proceeds and a dismissal ending reviewable jurisdiction, *cf. Stevedoring Services of America v. Ancora Transport, N.V.* 884 F.2d 1250, 1253 (9th Cir. 1989).

The restructuring of the mortgages met all of the elements of fraud so well explained in *Matter of Meredosia Harbor and*

Fleeting Service Inc., 545 F.2d 583 (7th Cir. 1976). All of the new financing agreements and mortgages of May 27, 1986 on the Econ Ship and the Lancers were to secure antecedent debt. No new money was lent, there was insolvency in fact at the time the mortgage was made and it is inconceivable that the probability of bankruptcy was not discussed by the lenders.

Under these circumstances Prudential as Lancer mortgagee, with advice of counsel, accepted an affidavit concerning the mortgagor's representation that no preponderant prior maritime lien claim existed. Prudential knew this was made in bad faith. This was "an outright attempt to evade the fundamental principle of Section 922(a)(3) that priority not be used as a means of avoiding other financial obligations, that act amounting to a fraud on third parties . . . ." *Prudential v. Lancer, supra*, p. 873.

> "The good faith requirement applies to the mortgage transaction. This creates in turn a derivative good faith requirement from the mortgagee. Upon a showing that the mortgagee knew of the mortgagor's bad faith such knowledge will trigger Sec. 922(a)(3). Since each of the requirements of Section 922(a) is independently necessary for a ship's mortgage to attain preferred status, the mortgagee's bad faith will defeat a mortgage's aspiration toward preferred status."
>
> *Meredosia, supra*, 587, 588.

After the U.S. Lines Chapter XI filing, the switch to admiralty was bought by Prudential for 17.5% of the vessels' proceeds. The defense of laches in this case was a cynical charade perpetrated by these accomplished legal tacticians who by so doing gambled they had escaped the claim under the Bankruptcy Code, 11 U.S.C. §541(d) for constructive trust, but who instead found themselves faced with a deeper dilemma. In-

tervention by Safir would mean not only a challenge by a preponderant prior lien but worse, the loss of any priority for breach of SMA §922(a)(3), § 924, penalties under §941, and the jeopardy, since realized, of a lawsuit from the client Prudential Insurance for malpractice claiming damages of $31,000,000 as of September 24, 1989.

Prudential instituted suit against Haight Gardner; Gilmartin; and Dewey Ballantyne (N.Y.S. Index No. 89-20968) after new counsel Weil, Gotshal & Manges successfully defeated the General Electric "decimal point" claim and while the proceeds of the ship sales remained invested in certificates of deposit by the Clerk of the Court at interest rates of approximately 9%. Clearly the injury to Prudential was not the denial of the use of the money it claimed as its own, but that the time consumed by the litigation over the typographical error removed all foundation to the defense of laches against Safir which would put its entire recovery at risk.

Despite the fraud and misrepresentation charged in the Safir affidavit in support of intervention, the Court held no evidentiary hearing on that issue. The Court found prejudice to Prudential and no lien and no excusable delay by Safir. In his motion for leave to appeal the petitioner by affidavit in the 2nd Circuit reiterated the nature of the misrepresentation under § 922 (a)(3). Without comment the Court denied the motion.

REASONS FOR GRANTING THE WRIT

Over the past twenty-five years (coincidentally the span of the Safir litigation) much has been written on the extent to which the unification of civil and admiralty procedure in the 1966 amendment to the Federal Rules of Civil Procedure has abolished the distinction between the two. The threshhold question asked by all recent commentators[2] is: to what extent has the merger of law and equity in the earlier 1938 rules change, when combined with the 1966 Supplementary Rules for Admiralty, eclipsed *The Eclipse*, 135 U.S. 599 (1890).

Petitioner believes that the Safir claim and the fact situation from which it sprung contains all of the elements for this Court to clarify the evolution of admiralty law from "the sterile theory of judicial separation" that Justice Stone found underlying *The Eclipse* in *Swift and Co., Packers v. Compania Columbiane Del Caribe, S.A.*, 339 U.S. 684, 694 (1950) to and beyond *Archawski v. Hanioti*, 350 U.S. 532 (1956) and *Vaughn v. Atkinson*, 369 U.S. 527 (1962).

Petitioner believes that the success of his claim does not require this Court to decree the equity millenium; holding instead the view that this petition can be decided on narrow terms previously taught by this Court in *Krauss Bros. Lumber Co. v. Dimon S.S. Co.*, 290 U.S. 117 (1933), thereby modestly cleaving to history without necessarily making it. Gilmore and Black (in Admiralty Law 2nd Ed. Chap. 1, p. 43) observed that few if any rules that would ban equitable relief in admiralty have the sanction of a square Supreme Court holding.

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[2]These commentators are: Smith, "Equity and Admiralty," Nwn. J. of Int. Law & Business 5:65 (1983); "Admiralty Practice After Unification, Barnacles on the Procedural Hull," Yale Law J. Vol. 81:1154 (1972); "The Case for Recognizing the General Equitable Powers of the Admiralty Courts," Keriakos, J. of Maritime Law & Comm. (1989).

The Yale commentator "Admiralty Practice After Unification", supra, pp. 1160-1162, in discussing *The Eclipse* itself, comes to the conclusion that "Where the facts underlying a claim are clearly maritime and within the subject matter jurisdiction of admiralty, *The Eclipse* and its progeny raise no bar to the granting of equitable relief." The Safir claim is clearly maritime and answers just the question left open in "Archawski" which is the extent to which the unjust enrichment is cognizable in admiralty as a basis for a maritime lien. Petitioner believes the issue was fundamentally resolved in "*Krauss Bros.*" a generation earlier.

The *Safir Claim Is A Maritime Lien*

The claim arises out of the breach of a 20-year maritime contract between the Federal Maritime Administration (MARAD) and United States Lines. The contract was authorized under the Merchant Marine Act 1936 (46 U.S.C. § 1171 *et seq.*). This contract includes as a covenant the wording of 46 U.S.C. §1227 barring payments of Operating Differential Subsidy (ODS) for crew's wages and other "necessaries" as those are defined under the Federal Maritime Lien Act (FMLA) (46 U.S.C. §971 *et seq.*) in the event these subsidies were used in a manner as to injure an unsubsidized American flag vessel owner in the employment of his vessels in the foreign commerce of the United States.

The Courts in the long list of Opinions Below have held that such breach occurred in the performance of the MARAD contract during a period of eleven months in 1965-1966 and that payments made to the promissor during that period of the contract's execution were recoverable to "make it up" to the petitioner, as victimized third party beneficiary, "for the burden that the operating differential subsidies imposed on him." *Safir v. Gibson*, 417 F.2d 972, 977-978 (2nd Cir. 1969). The amount and kind of ODS paid to U.S. Lines by the United

States as promissee was set forth in 46 U.S.C. § 1173(a)(b)(c) and included wages, insurance, maintenance and repair of vessels. MARAD has certified that ODS wages alone, paid to USL was $26,000,000 without pre-judgment interest.

This Court in *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1960) has held that the boundaries of maritime jurisdiction are conceptual, the most common of which are contracts to repair ships, to insure ships and for hire of "sailors and officers to man her." An ODS contract encompasses all three categories:

> "Liability arises in admiralty, as elsewhere, from breach of any valid maritime contract but until the parties have entered on performance, remedy for the breach is *in personam* only; the added advantages of lien status are reserved to the claimants under executed contracts."
>
> Gilmore & Black, *supra*.
> Chap. IX, § 9-22, pp. 635-636.

It is readily apparent that "the executory contract doctrine" defense was not available to U.S. Lines once the vessels had performed during the period of the breach. The only criterion to be met for the justification of lien status "is the means by which the vessel, treated as a personality or as impliedly hypothecated to secure the performance of the contract is made answerable for non-performance." *Krauss Bros. Lumber Co. v. Dimon S.S. Co.*, *supra*, p. 121, citing *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490 (1923).

While the majority of Supreme Court cases have involved contracts of affreightment, the Fifth Circuit has recently rejected the proposition that maritime liens are created only by breaches of that type. The Court in *E.A.S.T. Inc. of Stamford Conn. v. M.N. Alaia*, 876 F.2d 1168, 1174-1175 (1989) stated:

> The Supreme Court has never held that contracts of affreightment are the *only* maritime contracts which give rise to a lien. Rather as the district court held, a contract of affreightment is only a subset of the larger universe of maritime contracts which may give rise to a maritime lien.

The union of ships and cargoes and contracts of affreightment nevertheless form the linkage to the Safir claim for unjust enrichment as a maritime lien. The Courts below have affirmed the finding of the Federal Maritime Commission that rate reductions by U.S. Lines in concert with others for the carriage of ocean freight were predatory and unlawful. *Safir v. Gibson*, 432 F.2d 137 (2nd Cir. 1970), *cert. denied, sub nom. American Export, et al. v. Safir*, 400 U.S.942 (1970). They were designed, and did, draw cargo from the petitioner's unsubsidized ships and carried that cargo on their own vessels. Nevertheless unlawful freight rates are mere numbers without the ships to carry the cargo thus generated. It was ships of U.S. Lines, as "fighting ships" crewed with wage subsidized officers and seamen, insured by subsidized insurance premiums and repaired and maintained with subsidized payment to shipyards while carrying those cargoes which were the instruments of destruction.

The masters of the vessels in the U.S. Lines fleet, as well as their owners were well aware of the Section 810 (46 U.S.C. § 1227) contract clause during the cargo struggle with Safir's ships and their jeopardy for its violation. There was full publicity of a hearing before the Joint Economic Committee of the Congress in 1965 which culminated in the seminal investigation by the Federal Maritime Commission in its Docket 65-13 of the predatory action being taken against Safir's ships. Nevertheless these masters knowingly authorized the continued payment of subsidy funds for wages to their crews and authorized repairs to their vessels for which overpayment was made

by the Maritime Administration under the contract. Moreover a contemporaneous decision by the Maritime Subsidy Board in its Docket A-10 in 1965 had given the subsidy contractors and their Captains warning of the loss of subsidy in the event their ships engaged in unfair practices against unsubsidized American flag vessels.

The recovery of overpayment to establish a lien on a vessel was addressed by this Court in *Krauss Bros. v. Demion S.S. Corp., supra,* pp. 125, 126. Justice Stone stated:

> Admiralty is not concerned with the form of the action but with its substance . . . We see no distinction either in principle or in practical operation or convenience of maritime commerce, between the lien asserted here for overpayment of freight by mistake and those similarly made but induced by other means. Here, as there, the overpayment . . . occurred while the union of ship and cargo continued and the liability asserted was determined by events contemporaneous with that union.

In the destruction of petitioner's business and property, the overpayments were not made by ***mistake***. They continued to be made by MARAD in settlement for voyages during the period of the breach, until 1971 over the continued opposition of the petitioner. *See, Safir v. Gibson,* 330 F. Supp. 225 (D.C. E.D.N.Y 1971). The earlier overpayments and later accounting settlements were placed in U.S. Line's Capital Construction Fund (46 U.S.C § 1177) and used to finance the Lancer vessels which were built during the period of the late sixties and early seventies and whose proceeds petitioner now claims. The Court has also held:

> There is no difference between the case of a restitution in specie of the ship itself, and a restitution in value. The lien reattaches to the thing and

> to whatever is substituted for it. This is no peculiar principle of the admiralty. It is found incorporated into the doctrines of common law and equity . . . The owner and the lien holder whose claims have been wrongfully displaced, may follow the proceeds where they can distinctly trace them. In respect therefore, to the proceeds of the ship we have no difficulty in affirming that the lien in this case attaches to them.
>
> *Sheppard v. Taylor,*
> 5 Pet. 675, 710 (1831)

This Court in *Krauss* rejected the holding of the court below that the claim *indebitatus assumpsit* was a claim *in personam* only. The claim was held to be a maritime lien as long as the overpayment was the result of an executed contract where the ship was involved. Moreover the U.S. Lines breach was both willful as well as wrongfully *induced* by the complicity of government officials. These findings by the Secretary of Commerce in 1974, were affirmed in *Safir v. Dole,* 718 F.2d 475, 484 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1206 (1984) rehearing denied, 467 U.S. 1268 (1984). The government settlement for its own account left the balance of the claim to the private lienor. The finding of complicity and mitigation of settlement for government recovery was a clear concession that, as between the government and the petitioner, Safir had a better right to it. The balance amount of the claim cannot be in dispute because the money sought is not for consequential damages for the breach, the money sought is the easily calculable unjust enrichment from ODS which was the breach itself. *Zigas v. Superior Court of Cal.*, 174 West Cal. Rep. 806, 811, fn. 3 (1981), *cert. denied,* 455 U.S. 943 (1982).

The Swift Paradigm

This Court in *Swift and Co. v. Campania Caribe, supra,* pp. 694, 695 stated:

> The basis of admiralty's power is to protect its jurisdiction from being thwarted by a fraudulent transfer, and that applies equally whether it is concerned with executing its judgment or authorizing an attachment to secure an independent maritime claim. Cf. *The New York,* 113 F. 810; *the Columbia,* 100 F. 890 (judgment in admiralty vacated because obtained by fraud).

In this case the same threshhold question as arose in *Swift* arose in the appeal to the Second Circuit. The District Court claimed that the denial of intervention was not a final order and the Second Circuit, without any comment , denied leave to appeal. There was no finality problem with this appeal despite the lack of Rule 54(b), certification since the instant case falls within the scope of the exception for certain interlocutory admiralty orders, 28 U.S.C. § 1292(a)(3) (1982). *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943 (3rd Cir. 1985); *Maine Nat'l Bank v. F/V Explorer,* 833 F.2d 375, 377 n.5 (1st Cir. 1987). This Court in *Swift* pp. 688-689, had also scotched such avoidance under § 1291 citing *Cohen v. Beneficial Industrial Loan,* 337 U.S. at 546.

The circumstances here are identical. Fraud was claimed by the petitioner but the Court of Appeals unlike the Fifth Circuit in *Swift* made no holding as to the merit of the claim "doubtful" or otherwise. The Court merely turned a blind eye to the petitioner's pleadings in support of his appeal. The petitioner stated on February 27, 1990:

> The nature of the misrepresentation is clear. After the decision in *Safir v. U.S. Lines, et al.*, was hand-

> ed down on May 27, 1986, the law firms representing U.S. Lines and Prudential, two of whom are counsel here, recorded and endorsed the mortgages claiming they were free and clear of any priming maritime lien. They knew by the simple reading of the modification in *Safir v. U.S. Lines*, *supra*, p. 25, that the modification did not foreclose restatement of the Safir claim for unjust enrichment under the doctrine of *Archawski v. Hanioti*, 350 U.S. 532 (1955).

Here was a derivative issue raised in a litigation clearly maritime as a means of effectuating a claim incontestably in admiralty. The denial of relief is at odds with the Second Circuit decision in *Atlanta Shipping v. Chemical Bank*, 818 F.2d 240, 248 (1987). In the Lancer case, already before the District Court in admiralty, denial of equitable relief for fraud and unjust enrichment was inconsistent with *Atlanta*. The District Court, "unhobbled" by *Swift* as to its jurisdiction to grant an evidentiary hearing on the fraud or to grant other equitable relief to escrow or otherwise sequester funds advanced to Prudential from the proceeds, pending such hearing, found laches instead.

Laches surely determined the rights of *this* petitioner as final in the proceeding before Judge Owen in Docket 87-5842 S.D.N.Y. and yet the district court ordered that the denial of intervention be docketed as interlocutory (A 5a). Finality for purposes of appeal (by Endorsed Memorandum) was effected on January 30, 1990 only after the Supreme Court began deliberations in Docket 89-953 and only after more than $41,000,000 had been disbursed to Prudential from the funds in *custodia legis*. More than $3,000,000 has been disbursed to Prudential since. It is well settled that the release of the proceeds of the *res* and dismissal of a case brought on pursuant to Rule C of the Supplemental Rules for Admiralty and

Maritime Claims removes the jurisdiction of this Court. *Stevedoring Services of America v. Ancora Transport N.V.*, 884 F.2d 1250, 1253 (9th Cir. 1989). For the fact that a motion for dismissal has not been docketed, petitioner pays homage to *Rio Grande v. Otis, supra.* Only Prudential's awareness of petitioner's intent to raise the *Rio Grande* exception, on appeal, has made discretion the better part of valor. The denial of intervention should leave this Court "with the firm and definite conviction that a mistake has been committed." *McCallister v. United States,* 348 U.S. 19, 20 (1954).

The finding of laches after twenty-five years of continous litigation is clearly erroneous. There was notice — Prudential, through counsel knew of the revitalization of the claim on May 27, 1986 before petitioner was aware of it himself. There was no prejudice — the General Electric litigation delayed any release of the proceeds until August of 1989. There was excusable delay by the petitioner as delay was justifably required to run the gauntlet of injunctive traps instigated by the mortgagor and mortgagee in collusion. "Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense as it interposes against other forms of fraud." *Holmberg v. Ambrecht,* 327 U.S. 302, 396-397 (1945). *Larios v. Victory Carriers,* 316 F.2d 62, 66-67 (2nd Cir. 1963).

In contrast to the arguments set forth here as to the legal precedents which establish the validity of the Sfir claim as a maritime lien; the indelibility of that lien; and the precedents for timeliness of intervention so long as the proceeds of ship sales remain *in custodia legis* as set forth in the Safir Affidavit, Para. 18 (A. 29a); the following excerpted bench Order of the District Judge is quoted verbatim:

THE COURT: All right. Okay.

Mr. Safir, I sense here — and it's perfectly clear from your papers that you are probably more learned about the procedures of this court than almost anybody in this room, lawyers included. And to whatever extent you may, in all sincerity, believe that you were wronged twenty-two or three years ago — and I pass no judgment on that at all — it seems to me that a number of things are true.

First of all, if you have a lien against or had a right to a lien against these vessels or now their proceeds, that could have been asserted against the vessels when they were built, or afloat.

When were these vessels built?

MR. LAMBERT: They were built between 1968 and 1971, your Honor.

THE COURT: So you could have asserted a lien against them in '71, '2, '3, '4.

MR. SAFIR: Your Honor, may I —

THE COURT: No. I don't really need to dally with that. If you had a lien against the vessels — and I'm not at all certain this give rise to a lien against the vessels; but even if you did, that could have been asserted 15 years ago. And I gather that you could have lifted what you believed to be an injunction against you before Judge Nickerson two to three years ago. And I conclude that you probably don't have a lien against these vessels because liens attach to vessels because of somebody who serves on them or somebody who has a cargo in them or something of that kind. But even if you could have, that's years ago.

You could have come before me at any time. We've been up and down with this thing. We've had three zeros tossed in here to the Court of Appeals and back; and while you have

obviously filed your papers in June, this matter coming on, on the very last day of this proceeding is clearly out of time. There is absolutely no question in my mind that laches applies, and that this would be a prejudicial intervention for something that's been troublesome to resolve in this court — how long now? Two years? A year and a half?

MR. GEBB: It's over two years now.

THE COURT: Two years we've been dealing with this thing. And, therefore, I clearly find laches. I find prejudice. I find no lien. I find you could have acted in this court a couple of years ago, and probably that this claim has no validity being asserted here in the first place.

But given all of that, I am obliged to deny your request for intervention.

CONCLUSION

Most modern authorities since *Krauss Bros. Lumber* v *Dimon SS.Co.* supra have recognized substance over form in quasi-contract and the tracing and recovery of unjust enrichment and the Second Circuit in its decisions up to now is not an exception. The recent changes in FMLA passed in 1988 (46 USC § 31301 et seq.) have not changed the trend toward equity in admiralty. A proponent of a return to 19th century thinking admits:

> "The language and legislative history of that recent statute is so ambiguous that it is difficult to tell whether Congress meant merely to re-enact substantial provisions of the 1920 statute in a different form, or to adopt the broadest interpretations of that statute.
>
> Mattis, "Maritime Liens for Necessaries" of Maritime Law and Commerce Vol. 21 No. 2 April 1990.

An indication of Congressional intent can be found however in the refusal of the Congress in 1989, in spite of heavy lobbying by ship mortgage interests, to amend the 1988 legislation with a statute of limitations provision for maritime liens.

Petitioner prays that this Court will grant certiorari to reverse the orders of the Second Circuit in this case and to affirm the unification of 1966 as broadening the powers of the district courts to accommodate equitable remedies under the Supplementary Rules.

Respectfully submitted,

MARSHALL P. SAFIR
271 Grand Central Parkway
Floral Park, New York 11005
(718) 225-0210

June 27, 1990

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

90-7239

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA.

- v -

S.S. AMERICAN LANCER

MARSHALL P. SAFIR
as complainant intervenor appellant

NOTICE OF MOTION

For leave to appeal and Stay pending Appeal.

UNITED STATES
COURT OF APPEALS
FILED
MAR 9 1990
ELAINE B. GOLDSMITH
CLERK
SECOND CIRCUIT

Judge or agency whose order is being appealed Judge: Richard Owen.

Brief statement of the relief requested: Leave to Appeal and Stay Pending Appeal.

Complete Page 2 of This Form

By: (Signature of attorney)
MARSHALL P. SAFIR

Appearing for: Pro se
February 27, 1990

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

A TRUE COPY
ELAINE B. GOLDSMITH
/s/

Clerk

April 4, 1990

UNITED STATES COURT OF APPEALS
FILED APR 04 1990
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

/s/ WILFRED FEINBERG

/s/ WILLIAM H. TIMBERS

/s/ GEORGE C. PRATT

Issued as mandate: April 13, 1990

Previous requests for similar relief and disposition: Leave to appeal and for injunction denied Sept. 20 1989

Statement of the issue(s) presented by this motion: Whether the district court proceeding should be stayed pending appeal in order to maintain the jurisdiction of this Court.

Brief statement of the facts (*with page references to the moving papers*): More than $44,000,000 has been disbursed to Prudential out of the ship sale proceeds, entitlement to which this applicant claims a priming maritime lien under 46 USC § 953 the validity of applicant's lien has not yet been adjudicated. If all of the funds were disbursed and the case dismissed by the district court without a stay applicants claim to these funds would be moot.

Summary of the argument (*with page references to the moving papers*): There was error in the district court denial of intervention in the case and there was error in the district court interpretation of its powers to deny leave to file an interlocutory appeal under 28 USC § 1292(a)(3) where the rights and liabilities of the proposed intervenor and the other parties was involved.

ENDORSED MEMORANDUM

OWEN, District Judge:

The proposed intervenor's motion for leave to take an interlocutory appeal is denied.

So ordered.

Dated: January 30, 1990
New York, New York

/s/ Richard Owen
United States District Judge

EXHIBIT A

In the Uniteed States District Court
For the Southern District of N.Y. PRO SE OFFICE

The Prudential Insurance Co. of America,	:	Notice of Motion to Intervene-
Plaintiff,	:	as Plaintiff
—against—	:	
SS American Lancer, SS American Aquarius, SS American Apollo, SS American Lynx, SS American Astronaut their engines, tackle, apparel, furnishings, equipment and appurtenances, in rem,	:	87 CIV. 5842 (RO)
Defendants.	:	U.S. DISTRICT COURT FILE JUN 02 1989 S.D. OF NEW YORK

LEAVE TO INTERVENE DENIED AS PER MINUTES 7/14/89 SO ORDERED (RO) USDJ.

PLEASE TAKE NOTICE on the 9th of June 1989 at 9:30 AM or as soon thereafter as counsel can be heard, that Marshall P. Safir will move this Court for leave to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure in order to assert claims against the vessel proceeds now held *in custodia legis*. He recites the following as the grounds why he should be permitted to intervene; he has a *priming maritime lien against the proceeds of the above defendant vessels in rem and his interest is such* that disposition of this action may impair or impede that interest which appears more fully in the attached affidavit and verified complaint and which may be competing with the interests of other plaintiffs.

Yours, /s/ Marshall P. Safir
271 Grand Central Pky.
Floral Park, new York 11005
(516) 225-0210

Date: June 2, 1989.

MICROFILM
JUL 20 1989 12.00 PM

UNITED STATES GOVERNMENT

memorandum

DATE: July 20, 1989

REPLY TO
ATTN OF: Beth Miniter, Pro Se Office

SUBJECT: Interlocutory Order (Motion to intervene denied)

TO: Unit #4.

Docket Number 87 Civ. 5842 (RO)

Please docket the attached interlocutory order.

Thank you.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE PRUDENTIAL INSURANCE
OF AMERICA,

Plaintiff,

v. 87 Civ. 5842 (RO)

S.S. LANCER,

MINUTES

Defendant.

----------x

July 14, 1989
2:30 p.m.

Before:

HON. RICHARD OWEN

District Judge

APPEARANCES

McCUTCHEN, BLACK, VERLEGER & SHEA
Attorney for plaintiff, Prudential Insurance Company
SHELDON A. GEBB

WEIL, GOTSHAL & MANGES¢
Attorney for plaintiff, Prudential Insurance Company
JUDY G.Z. LIU

GILMARTIN, POSTER & SHAFTO
Attorney for the Claimant, U.S. Lines, Inc.
MICHAEL C. LAMBERG

MARSHALL P. SAFIR, Pro se

EDWIN A. STEINBERG, Intervenors, MM&P

(Case called)

MR. GEBB: Your Honor, I'm Sheldon Gebb with the McCutchen firm representing the Prudential Insurance Company. And this is my co-counsel, Judy Liu, Weil, Gotshal.

Your Honor, if I might start with a brief status report where we stand at the moment. We have, as you know, settled — the GE Credit case has been resolved. We settled ten of the personal injury cases which your Honor has approved the settlements on. There is a wrongful death case which we have settled, and we will be submitting papers to your Honor for the settlement of that case.

There remains six personal injuries cases which we have likewise settled, and we will be preparing and submitting papers to you for the approval of those settlements.

Prudential has a motion on today for partial summary judgment requesting the court distribute the major portion of the funds that are held in the registry of the court, and that a default judgment be entered against parties who are not before this court.

There has been no opposition filed as to the people of the parties who are before this court in this action. There is, however, a claim or a petition by Mr. Safir to intervene in these proceedings, which Prudential and U.S. Lines have filed objections to.

Likewise on for hearing today, your Honor, is a motion for summary judgment by the Masters, Mates & Pilots regarding union benefit claims.

I would suggest, your Honor, that it probably would be in order to first take the intervention motion of Mr. Safir.

THE COURT: All right.

MR. SAFIR: Your Honor, I'm Marshall Safir, pronounced like the gem stone. And I'm here moving to intervene in this proceeding based on the fact that I have what I consider a priming maritime lien which primes the Prudential mortgage.

I have submitted to you, your Honor, in my motion, my affidavit, my case. I have also submitted my reply to the opposition, and, as I'm acting pro se, I'm not too familiar or too comfortable with the oral part of this procedure.

However, I would like to say that I would stand firmly on what has already been in the record, as far as my arguments for intervention.

However, there are two things I'd like to add which have occurred, and which I would like — I guess you'd call it supplementary proceeding, supplementary pleadings, with documents are relevant to a motion that I filed, for leave to — since I filed the motion for leave to intervene in the hearing here, and these certain events occurred between June 23rd, 1989, when I received notice that the hearing had been postponed to July 14th.

And so in the interim, I filed a motion in the Court of Appeals on July 5th for injunction which was filed in Docket 89-7549, which was the Safir V. United States Lines, et al., to enjoin the July 14th effective date of the plan of reorganization of United States Lines in Mclean Industries, pending appeal of Judge Nickerson's orders in Safir v. U.S. Lines, which is the subject which is discussed in the earlier papers before this court, and also requested that an injunction issue pending the decision of Judge Owen, yourself, your Honor, in this case, based on what he considered the validity of the Safir lien as priming the Prudential mortgage and warranting intervention.

Since that time, an order to show cause to extend the effective date of the plan of reorganization of U.S. Lines for at least 30 days beyond July 26, 1989, was signed by Judge Bushman on July 11th.

The reasons for the delay, inter alia, was the need to resolve certain priority claims, and the lack of $3 million of unrestricted cash to close a stock purchase agreement that was involved in the plan of reorganization.

This money was escrowed and had been — this was seed money which was escrowed, and it was the subject of my claim to that same escrow money before Judge Nickerson in requesting leave to intervene in that bankruptcy action owhen I was before him. That issue is now on appeal in the court above in docket 89-7549.

Based on the above and the fact that these people have decided to postpone the effective date of the injunction, the need for injunction has been more or less deliberately mooted by the debtor's own actions, and effective today the motion for injunction by the Court of Appeals has been denied. My motion has been denied.

It's perfectly clear that the debtor, United States Lines, who was the junior partner in the settlement of the in rem proceeds here, it is clear that U.S. Lines, who filed no papers in opposition to the motion for injunction, has opted to back off rather than risk the test of the validity of the Safir claim in that case under 11 USC 541 D, in the bankruptcy forum, as the debtor and Prudential have apparently, for over a month now, delayed the test here.

I, as applicant, pray that my motion to intervene be granted, and the prudential motion for partial summary judgment be denied. Thank you.

THE COURT: Yes.

MR. LAMBERT: Your Honor, Michael Lambert of the form of Gilmartin, Poster & Shafto, for the debtor and claimant in this action, United States Lines.

As your Honor is aware, from the papers that we filed, we oppose Mr. Sapphire's motion —

THE COURT: I'm aware that you have opposed it, but I'm not aware of the contents of it.

MR. LAMBERT: Okay. I'll just briefly summarize them in argument, your Honor.

We contend that the motion to intervene should be denied for three basic reasons.

The first is, it is in direct — the application itself, the motion to intervene itself is in direct violation of a Second Circuit injunction enjoining Mr. Safir from — and I quote — "commencing additional federal court actions relating in any way to United States Lines' pricing practices or Merchant Marine subsidies during the 1965-1966 period without first obtained leave from the District Court."

The district court to which that order has reference is Judge Nickerson's court in the Eastern District.

Now, I'd like, very briefly, your Honor, to encapsulate for your Honor 20 plus years of history, most of which is taken up by one litigation after another, commenced by Mr. Safir, in order to give this court some idea of how that Second Circuit injunction, which was issued in 1986, came to be entered.

Mr. Safir started out making allegations that a number of ocean carriers, including United States Lines, engaged in various predatory practices back in 1965 and 1966, with the intention of driving a company that he started, called Safir Steamship Lines, out of business.

To seek vindication for these activities, Mr. Safir has filed suit after suit. By Judge Miner's count in 1986, he had filed 11 separate federal court suits arising out of these 1965-1966 pricing practices. Mr. Safir has attempted to block corporate mergers in administrative agencies; and when that filed through the courts, yet with one exception — which is a court-approved settlement in the early 1970s, with the trustee in bankruptcy of Safir Steamship Lines, in which the defendants, including United States Lines, settled for approximately $2.5 million — no court has ever ruled that United States Lines owes Mr. Sair a single penny for the events of 1965 and 1966, and certainly not for lack of trying on Mr. Safir's part.

In fact, several year ago the District of Columbia Circuit, through Judge Scalia, now Justice Scalia, ruled that Mr. Safir lacks standing to pursue the recoveries that he's been seeking in these litigations based on subsidies paid to the United States Lines and the other shipping companies by the information government.

Finally, Mr. Safir's litigious actions got so out of hand that in 1985 Judge Nickerson enjoined him from bringing any further actions, petitions, motions, et cetera, arising out of the 1965 andn 1966 events.

Mr. Safir, as is want, appealed that injunction to the Second Circuit, and that is the decision to which I referred at the outset of my argument in which the Second Circuit finding — and now I'm quoting varioiusly from the Second Circuit's opinions which is reported at 792 F.2d 19 — "that Mr. Safir was bringing the same claims over and over in slightly altered guise even though" — quote — "most of his claims have been reexamined and rejected by the courts, and that he was engaging in what litigation was" — quote — "meritless, duplicative and burdensome to the defendants and to the courts," and again

— I'm quoting — "that his abuse of judicial process could not be countenanced."

The Second Circuit affirmed Judge Nickerson's order enjoining further litigation. The Second Circuit modified Judge Nickerson's order slightly, to give Mr. Safir an out if he could convince Judge Nickerson that he had a valid claim, that he could continue to litigation, but only to permit with express permission from the District Court.

Unfortunately, the Second Circuit injunction did not end the nonsense. Mr. Safir pressed ahead undeterred. In 1987 he tried to file a new complaint on a supposedly new theory, again, arising out of the '65 and '66 events. And I might point out, your Honor, the '65 and '66 events are the very events that form the basis of his attempt to intervene in this action. I'll get to that later.

Judge Nickerson denied that application in 1987. In May of this year, he tried again before Judge Nickerson. Judge Nickerson denied the application.

In May of this year, he tried to get Judge Nickerson to allow him to participate in the United States Lines bankruptcy proceedings before Judge Bushman. Obviously, that was for the same reason that he's attempting to intervene here. He's trying to lay claim to United States Lines assets that we need to successfully reorganize in the bankruptcy court. Both of those May applications before Judge Nickerson have been denied, and as is want, they've both been appealed to the Second Circuit.

In fact, in June of 1988, Mr. SAfir moved in the United States Supreme Court, in an existing action of his, which appears to me to relate — I wasn't in that — to an effort by his to block the acquisition of Sealand, which is another ocean carrier, by CSX Corporation before the Commerce Commission.

And in that appeal he sought to enjoin this court or the bankruptcy court in this district from dispersing the Lancer proceeds that your Honor has jurisdiction of. That application was, of course, denied.

In December of last year, he tried to intervene in the appeal that General Electric Credit Corporation took from your Honor's decision as to the amount and priority of prudential's mortgage in this case.

So now we are here before your Honor. He's here without permission. Judge Nickerson has turned ldown every application that he's made, and he's here in violation of the Second Circuit's injunction.

As Mr. Safir himself pointed out, as we are sitting here today, the Second Circuit denied yet another application of his to enjoin the implementation of United States Lines' plan of reorganization.

So the first of the primary reason why this application should be denied is it's in violation of the Second Circuit's injunction.

Another reason is that it's untimely and it's prejudicial. It's untimely in light of prior orders that your Honor has entered in this proceeding setting deadlines for the filing of maritime lien claims. It's in violation of local Admiralty Rule 15, which says that claims which come in after the sale of the vessel are limited to remnants and surpluses, and as your Honor is undoubtedly aware, there will we no remnants and surpluses from the sale of the defendant vessels in this case.

And it's prejudicial. United States Lines is counting on the approximately $11.6 million it expects to recover out of Prudential's share of the proceeds from this ship — from these ships, and that money is necessary for the success of U.S. Lines' plan of reorganization, which has been approved by

Judge Bushman on the assumption that most of that money would be available.

It's untimely under the Doctrine of laches which is applicable to maritime lien claims. Mr. Safir has simply waited too long to bring it.

The defendant vessels here were built in 1968 through 1971; and, as far as I know, Mr. Safir was not under any injunction against — litigation against United States Lines until 1985. There is absolutely no reason — if he had a valid lien claim on these vessels, he could have asserted it at any time between 1971 and 1985.

And finally, las we cite in our brief, your Honor, there is no authority for the proposition that a claim for a constructive trust, which is apparently Mr. Safir's present contention that gives rise to his claim to this money — there's no basis for saying that gives rise to a martime lien.

And finally, your Honor, the automatic stay in the bankruptcy court, that has been lifted so that Prudential can pursue this action, has been lifted solely so that parties who have maritime liens can assert them. If Mr. Safir doesn't have a maritime lien, he has no business intervening in this court even if he weren't under injunction. If there's one thing clear in the relief sought by Mr. Safir, it is that he does not have a lien on these proceeds or on these vessels. As we discussed in our brief maritime liens arise out of the operation of vessels. Maritime liens are vessels specific, as it were.

For example, Prudential has a lien on these vessels because my client, United States Lines, gave lthem a specific mortgage on these particular vessels. The various seamen that intervened in this case arguably have maritime liens on these vessels because they claim they are injured because of events which took place on these vessels.

In marked contrast to those situations, none of the vessels — none of the defendant vessels in this case were even in existence in 1965 and 1966 when the events which give rise to Mr. Safir's claim allegedly took place.

As we point out in our papers and opposition, these vessels were built between 1968 land 1971. As a result, their operation had absolutely nothing to do with any alleged wrongful conduct in 1965 and 1966. And since they had nothing to do with the wrongful conduct, there's no theory of which we are aware, your Honor, that would give Mr. Safir a right to claim a maritime lien on these defendant vessels, and now on the proceeds from the sale of these vessels.

So for those three reasons, your Honor — one, violation of the injunction; two, untimely and prejudicial; and, three, were under substantive matter — he simply has no maritime lien claim.

We submit that the application for leave to intervene should be summarily rejected. Thank you.

THE COURT: Anybody else want to be heard?

MR. GEBB: Your Honor, Mr. Lambert has covered the legal points. I would just like to say on behalf of Prudential that we've now been engaged in litigation over two years on what started out to be a simple foreclosure of a ship's mortgage, that we have some over $40 million in the registry of this court which we have made application — which we have made the motion to the court to have released. For every one of the claimants, the problems have been solved, we have set aside the money to take care of the unresolved claims.

Now, at the final hour, when we were about to be in a position to have our motion granted, which actually we should be able to have granted today, we now have Mr. Safir coming out of the background and filing this motion.

It is costing everyone money for delay in having what should be a very simple problem resolved, and I have just recently learned that now even the clerk's office here charges and interest charge while the money is held in the registry of the court. And so we submit, you know, time is of the essence in this matter, as far as getting us into a position owhere we can obtain the funds for our client.

Thank you, your Honor.

MR. SAFIR: Your Honor, may I say a few words?

THE COURT: You may.

MR. SAFIR: Thank you, sir.

First of all, the delay, since I have moved here, is not mine. It is Prudential;s and U.S. Lines'. I wanted to have the issue settled the first week that it came up on June 9th, and you people ketp postponing this thing because you apparently were caught off guard. you didn't expect me to come in or be able to come in.

The second thing is I am not under any injunction to appear before you, your Honor. This is a District Court, just like the District Court in Brooklyn, and there's no relationship between Judge Nickerson — if Judge Nickerson unfortunately had died, the injunction would not go with him. There would be other District Court judges who would decide whether I had a meritorius claim.

This door was left open by the Second Circuit in the decision mentioned, 792 F.2d 19. The door was opened. The issue here is — and it's up to Judge Owen to decide de novo — whether I have a maritime lien claim against these proceeds.

The idea that the -- that a maritime lien must be tied exactly to a vessel, while it has now been a subject of the new

maritime code, was not — was not the reading of a maritime lien prior to the passage in 1988 of the new code.

This action that we are involved in here is covered under the precedent — the precedent set over the last fifty years as to what constitutes a maritime lien.

And this Second Circuit has been very clear that both as to — as to liens —as to — as to in personam and in in reem liens, that the admiralty laws should be read quite broadly.

Here I am basing the entire thing on the unjust enrichment from wage claims that U.S. Lines and others made and accepted payment on, which they had not right to have. The unjust enrichment from those claims, those wage claims, the fruits of that unjust enrichment represented the seed money that these ships — these Lancers were purchased with.

The amount of money that U.S. Lines received during the years 1965-66, 25 or 30 million dollars in unjust enrichment, as a result of using those funds to drive me out of business, using those wages that I had paid more than they did, where they were subsidized and weren't permitted to use that type of subsidy fund to drive another American flag operator out of business, that money was used to purchase these ships. So that the thing goes back to that.

Now, a statement was made that there was never a time when the courts decided that Safir had a claim. There was a judgment of liability established by Judge Bryantin the District of Columbia Court in 1981. It very specifically said that these people were reliable for recovery of funds. I had a judgment as to liability which I, then under contract, am able to proceed now in — as a contract case.

The maritime contracts are recognizable in admiralty, and certainly lan agreement between U.S. Lines and the Maritime

Administration, the United States, is a maritime contract. I was the third party beneficiary to that contract. Because the law said — the contract said, which followed the law, that no subsidy could be paid for ships' wages, to a line who was found to have preditorily driven another American flag operator out of business.

The situation has grown over the years because there has been no — at no times was I — until 1981, was I able to bring a contract suit about. I attempted then to find a way of receiving a remedy through the statute itself. The Second Circuit found that there was no implied remedy under the statute. And that was the basis of the decision in 1986, of Safir v. U.S. Lines, cited earlier.

I then went back and decided to review it during a period when the Statute of Limitations had not run, and said: Well, if it isn't based on am implied right of action under the statute, I had a right of action as a third party beneficiary under a contract.

All this — the contract issue has never been decided by the courts as to whether I had a right of action as a third party beneficiary under the contract. It has been avoided by Judge Nickerson, even though it was part and parcel of a filing of a complaint in 1987. He has not tackled the issue on the merits. Has avoided it.

For the first time I'm here before Judge Owen, and this is a new case based on the circumstances of that occurrence in the 1987 case.

This is a cause of action with a remedy which I am permitted here in admiralty, where there is some leniency as to statutes of limitations.

The issue is contract. And this is a maritime contract and these are wage claims.

This Circuit has shown — I didn't go into this before, but there are two cases, recent cases in the Second Circuit which cover unjust enrichment in regard to maritime liens. And I'll give you the citations now. Now, I believe I have them here. "The claim for recovery of unjust enrichment for monies advanced to pay crews' wages is entitled to rank of preferred maritime lien." And the citation is General Electric Credit, a name familiar here, v. Drill slips, et cetera, 668 F.2d 811, that's a 5th Circuit cas ein 1982.

"And the proceeds of the sale of lthe vessels serve as the rates for a constructive trust." And that's a Second Circuit decision, Gulf Oil v. Creo Company, 596 F.2d 519, 1979.

So here you have the entire composite. And it's up to Judge Owen to decide de novo whether I have a valid preserved maritime lien.

This is the first time this has come up it has not come up before, and it is still timely. And I'll leave it up to Judge Owen.

THE COURT: Mr. Safir, why couldn't this claim have been asserted two years ago in this court?

MR. SAFIR: Because at that time, your Honor I was under the injunction against me, which had not been — the mandate had not been changed.

When I appealed the draconian injunction of Judge Nickerson, the 1985 injunction, the Court of Appeals in 1986 affirmed it, but modified it. And the modification called for the right to come back in, in to Judge Nickerson, or anybody else, for that matter, in the district court, to — if I had a meritorious new theory of recovery.

THE COURT: That's 1986.

MR. SAFIR: That was 1986. Now — and I'm glad you mentioned it.

At that time I, not knowing that perhaps I must make a motion, and perhaps I didn't have to make the motion, the mandate was sent down to the District Court, and the modification should have beeen attached to the injunction. It never was.

The only time it was attached to the injunction, so othat I could move in your court or any other court, was two months ago when, on motion to Judge Nickerson, I asked for, under Rule 60(b)(5), that a mistake be corrected, that the injunction that was still on file in its original form, be modified in accordance with the Second Circuit decision in 1986. This was done on May 18th of this year.

And it was only then that I could come before you because the injunction was completely strict and exclusive up until that time.

THE COURT: But in theory, you could have modified it in '86.

MR. SAFIR: In theory, I could have. But in theory — but in fact, Judge Nickerson could have done so when I filed my new claim in his court in 1987. This is docketed. This is — and this is part of the case which is now in the Court of Appeals.

THE COURT: And you were aware he could have done that in '87?

MR. SAFIR: Well, we did file — we did file it in '87. I was not aware of the fact at that time that I had this restriction in any other court, other than bankruptcy courts.

THE COURT:If you didn't have an awareness of that, you could have acted here any time after '87.

MR. SAFIR: I could have acted here any time after — after the injunction had been modified.

THE COURT: All right. Okay.

Mr. Safir, I sense here — and it's perfectly clear from your papers that you are probably more learned about the procedures of this court than almost anybody in this room, lawyers included. And to whatever extent you may, in all sincerity, believe that you were wronged twenty-two or three years ago — and I pass no judgment on that at all — it seems to me that a number of things are true.

First of all, if you have a lien against or had a right to a lien against these vessels or now their proceeds, that could have been asserted against the vessels when they were built, or afloat.

When were these vessels built?

MR. LAMBERT: They were bult between 1968 and 1971, your Honor.

THE COURT: So you could have asserted a lien against them in '71, '2, '3, '4.

MR. SAFIR: Your Honor, may I —

THE COURT: No. I don't really need to dally with that. If you had a lien against the vessels — and I'm not at all certain this give rise to a lien against the vessels; but even if you did, that could have been asserted 15 years ago. And I gather that you could have lifted what you believed to be an injunction against you before Judge Nickerson two to three years ago. And I conclude that you probably don't have a lien against these vessels because liens attach to vessels because of somebody who serves on them or somebody who has a cargo in them or something of that kind. But even if you could have, that's years ago.

You could have come before me at any time. We've been up and down with this thing. We've had three zeros tossed in here to the Court of Appeals and back; and while you have

obviously filed your papers in June, this matter coming on, on the very last day of this proceeding is clearly out of time. There is absolutely no question in my mind that laches applies, and that this would be a prejudicial intervention for something that's been troublesome to resolve in this court for — how long now? Two years? A year and a half?

MR. GEBB: It's over two years now.

THE COURT: Two years we've been dealing with this thing. And, therefore, I clearly find laches. I find prejudice. I find no lien. I find you could have acted in this court a couple of years ago, and probably that this claim has no validity being asserted here in the first place.

But given all of that, I am obliged to deny your request for intervention.

Do you wish to submit a formal order accordingly at the front table?

MR. GEBB: Yes, your Honor.

MR. LAMBERT: Yes.

THE COURT: Very good. Now, these minutes obviously constitute that order.

MR. GEBB: Yes, your Honor.

THE COURT: And all a formal order does it to put it in language that is readable elsewhere, if not here.

Now, that leaves us with your proposal for certain distribution which I take it is unopposed by any other interest.

MR. GEBB: That is correct, your Honor.

THE COURT: All right. Your proposal is granted.

Do you have an order for me to sign today?

MR. GEBB: We will submit an order, your Honor.

THE COURT:All right. Very good.

And that leaves in — the last thing on the calendar is the motion by the Masters, Mates & Pilots Union over their fringe benefit claim.

MR. STEINBERG: Yes, your Honor, if I may be heard. Edwin Steinberg for the individual retirement account plan and on behalf of certain individual seamen who served aboard the vessels.

A maritime line claim that we are asserting is comprised of two separate parts.

One is the contributions that U.S. Lines did not make to the Individual Retirement Account Plan, and the other part of it is the vacation plan that the individual seamen did not receive. These have been characterized as contributions to the vacation plan, but that is not quite accurate, and I will discuss that when we get into that portion of the argument.

I'll deal with the Individual Retirement Account Plan.

THE COURT: Let me ask you this: How does this affect the motion for certain payout here? You are now discussing some entitlement to a balance that's left of —

MR. LAMBERT: That's correct.

MR. GEBB: We reserved, your Honor, the amount of

In the Uniteed States District Court
For the Southern District of N.Y.

The Prudential Insurance Co. of America,	:	
Plaintiff,	:	Docket #87
	:	CIV. 5842 (RO)
—against—	:	
	:	IN ADMIRALTY
SS American Lancer	:	
SS American Aquarius	:	*MOTION TO*
SS American Apollo	:	*INTERVENE*
SS American Lynx	:	
SS American Astronaut	:	Under Rule 24 (b)
their engines, tackle, apparel, furnishings, equipment and appurtenances,	:	F.R.C.P.
in rem,	:	
Defendants.	:	

AFFIDAVIT OF MARSHALL P. SAFIR IN SUPPORT OF HIS MOTION FOR LEAVE TO INTERVENE

MARSHALL P. SAFIR, being duly sworn deposes and says:

1. Affiant is the holder of a claim against US Lines and the proceeds of the Lancer Vessels in rem for unjust enrichment arising out of a breach of a maritime contract wherein he was the intended third-party beneficiary.

2. By the clear language of the Ship Mortgage Act (46 USC § 953(a) (1) (b) (1), the claim represents a priming preferred maritime lien of such proportion as to eliminate any recovery

by Prudential Insurance Co. of America, the 1st preferred ship mortgage holder of the proceeds of the Lancer sales now in custodia legis.

3. Moreover the claim of constructive trust represents such total interest in those proceeds as to render nugatory the agreement of Prudential with the appellee-claimant US Lines, debtor in possession by establishing the knowledge of those partners of its existence prior to recordation and endorsement of the mortgage as amended in 1986.

4. The history of the Sfir litigation began in the Second Circuit with the decisions in *Safir* v *Gibson*, 417 F2d 972,1977 (1969) and *Safir* v *Gibson*, 430 F2d 137, 145 (1970) cert. denied 400 US 850, 942 (1970), which established that this affiant was the intended beneficiary of the § 810 clause in the maritime operating differential subsidy contract of U.S. lines and other American Flagship lines lwhich incorporated the wording of Section 810 of the Merchant Marine Act of 1936 in each and every such contract. The Court held that an enforceable cause of action for la remedy would lie for the victim of the breach.

5. On November 6, 1981, the District Court for the District of Columbia (Bryant, C.J.) held that Section 810, MMA '36 had been violated by all the subsidized members of an American ship conference (which included US Lines) and that these violators were liable for the recovery of the officers and seamens wage subsidies illegally paid during the period of violation. See *Sfir* v *Klutznick*, 526 F. Supp. 921 (DDC 1981). The amount of these payments to US Lines was certified by the Maritime Administration to be $26,844,437.62. When interest is added since February 28, l1966 therein the unjust enrichment is now in excess of $150,000,000.00.

6. The judgment in "Klutznick" was modified by the decision in *Safir* v *Dole*, 718 F2d 475 (DC Cir 1983) cert. denied

104 S.Ct. 2389 rehearing denied 104 S.Ct. 3563 (1984) which reduced the amount of subsidy recovery for the government's account below the amount recommended by the District Court by upholding the finding of the Secretary of Commerce lin 1974 on which a lower government settlement was based.

7. The government's settlement of the breach for its own account, which was publicly announced three years before the earliest Prudential mortgage was placed on the Lancers in 1978, was mitigated because of the Secretary's finding of complicity of government officials in the conspiracy against the affiant. This was a clear concession that as between the promissee Maritime Administration and Safir the third-party beneficiary, Safir as claimant since 1967, had a better right to the balance of the shipwage differentials. The fact that the Secretary of Commerce's duty under the Merchant Marine Statute, Section 810 (46 U.S.C. § 1227) might not encompass the government's handing its share ovedr to a private claimant (cf. *Safir* v *Dole*, supra) was irrelevant to Safir's quasi-contract and US Lines obligation under the wage differential subsidy contract.

8. From the time of the "Klutznick" judgment as to liability in 1981 and the "Dole" modification in 1983, US Lines knew that the constructive trust related back to the wrong which caused its creation and that Safir had a cause of action which ran from the judgment flowing from the conduct.

9. Moreover, the claim was not contingent as to liability as all the events which would trigger the liability had occurred by November 8, 1981 with *Safir v Klutznick, supra*. Nor was there a bona fide dispute under the third party beneficiary doctrine according to the Restatement of Contracts Second § 302-313 (1) where in this claim the money sought was not for consequential damages for the breach; the money sought is for the easily calculable unjust enrichment which was the

breach itself. See *Zigas* v *Superior Court of California*, 174 West Cal. Rep. 806, 811 ft. n.3 cert. denied 455 U.S. 943 (19082).

10. When Prudential entered into the Amended Ship Mortgage Agreement in 1986 (and which agreement was the subject of the decimal point controversy decided by this Court [(686 F. Supp. 469 S.D.N.Y. 1988) affirmed 870 F2d 867 (1989)] — *Admiralty Counsel for Prudential was HAIGHT, GARDNER, POOR AND HAVENS.* That law firm which was responsible for the *decimal point* error, was *at the same time* representing United States Lines Inc. in the litigation in *Safir* v *US Lines et al* 616 F. Supp 613 (1985) modified 792 F2d 19 (2nd Cir 1986) cert denied 107 S.Ct 1323 (1987). Haight, Gardner remains counsel of record in *Safir* v *US Lines* in Docket 85-0864 E.D.N.Y. (Nickerson, J.) as of May 12, 1989 with Richard G. Ashworth Esq. in New York and John W. McConnell in Washington representing US Lines and US Lines S.A. Therefore when Prudential entered into the 1986 mortgage agreement Prudential knew that the Safir lien claim would prime their mortgage. US lines through counsel was under obligation to disclose the nature of the "Klutznick" judgment and the restitutionary claim which arose thereunder, which was pleaded in 1985 in Docket 85-0864 and which was recast in 1987 and is now on appeal as a result of the order of April 25 and May 12, 1989. See ORDERS, Attached 1&2 hereto.

11. Applicant Safir has no need to obtain through discovery the "allegations in the exclusive control" of the mortgagee as to its prior knowledge (as argued by Prudential's counsel in the Memorandum of Law in Support of Partial Summary Judgment page 13-14 citing *Knight* v *US Fire Insurance* 804 F2d 9, 11-12). Moreover, the existence of the agreement between Prudential and US Lines for the sharing of the proceeds if Prudential and US Lines for the sharing of the proceeds if Prudential is successful in this action speaks to their privity

and collusion in keeping lthe knowledge of the Safir priming maritime lien from this Court during the period when this applicant was under the injuctive restraints explained below.

12. This affidavit controverts the Statement of Material Facts which forms the basis for the Rule 56 motion now before the Court. As stated in *Prudential* v *American Lancer et al* US Court of Appeals 2nd Circuit Docket 88-7589 Slips Opinion March 21, 1989, at page 2091, the sole issue thus far decided is "the decimal point issue". The Safir claim primes the Prudential mortgage and the controversy if any, as to that fact would alone defeat the motion now before the court.

13. Had this Court had knowledge of the Safir claim and the circumstances herein outlined, this Court would not have granted the Prudential mortgage priority status under 46 USC § 953 when the most fundamental condition of SMA § 922(a)(3) had not been met. Where an affidavit was required to be made in good faith, this one was instead designed to knowingly defraud a then existing constructive trust beneficiary. Both parties acted under jeopardy of SMA § 924.

14. The clear meaning of the Second Circuit discussion in the Decimal Point decision Slip Opinion page 2096 in regard to *In the Matter of Meredosia Harbor and Fleeting service Inc.* 545 F2d 583, 587-588 was that the mortgagee is not absolved by the mortgagor's bad faith when the mortggee himself has unclean hands. In this case the Haight, Gardner dual role is prima facie evidence that the conditions of § 922 (a)(3) were not met.

15. Affiant has up to May 18 1989 been enjoined from filing any new actions in Federal District Courts by an order of the District Court for the Eastern District of New York (Nickerson, Jr.) since 1985. The injunctive effect-the inabili-

ty to gain access to this Court in the ensueing months has had harmful consequences which only this Court can reverse.

16. Court of Appeals in *Safir* v *US Lines et al,* 792 F2d 19, 25 (2nd Cir 1986) cert. denied 107 S.Ct. 1323 (1987) modified the District court injunction against any filing by the affiant of federal court actions for relief arising out of the violation of Section 810 MMA '36 so as not to foreclose a meritoriums claim.

17. The District Court upon the mandate of the Second Circuit took no action to modify the injunction until affiant filed a motion under Rule 60(b)(5) to assure that the original order as written would have no prospective effect. The District Court on April 25, 1989 issued the modifying order which order itself incorrectly referred to the motion as one under Rule 59(e). Affiant then moved to correct the April 25 order within 10 days as required under Rule 59(e). Affiant then moved to correct the April 25 order within 10 days as required under Rule 59(e) which resulted in the order of May 12, 1989 filed May 18, 1989. A notice of appeal to the Second Circuit from the denial on the merits of an action filed (within the statute of limitations) October 14, 1987 for a statutory remedy under 42 USC § 1985(e) and a civil restitutionary remedy for breach of contract has been timely filed. Nevertheless the reinstated right of this applicant to request leave to intervene for the purpose of filing a meritorius maritime lien claim in a district court sitting in admiralty is less than two weeks old.

18. Unlike the plaintiff in *Empire Stevedoring* v *Oceanic Adjusters Ltd* 315 F. Supp 921, 926 (D.S.D.N.Y. 1970) affiant Safir did not relinquish a lien by failing to respond to a court directive. On the contrary the district court injunction up to now has blocked any means of executing his lien in admiralty. Nevertheless the "decimal point" litigation has removed any

claim of prejudicial delay to the claimants in the instant an action and affiant is informed that it has been held that where the proceeds remain *in custodia legis* intervention and assertion of a right against the proceeds is available. *Defense Plant Corp* v *United States Barge Lines* 145 F2d 766, 767 (2nd Cir 1944); *Crabtree* v *SS. Julia* 290 F2d 478 (5th Cir 1961).

19. Affiant is informed that the Supreme Court in *Archawski* v *Hanioti* 350 US 532 (1955) has held that this Court sitting in Admiralty has jurisdiction to prevent unjust enrichment from a maritime contract. The contract between US Lines and the Maritime Administration for MARAD payment of the differential in wages of seamen and officers on US Lines ships as distinguished from the wages of foreign flag lines represented a maritime contract which was breached when that differential was used to destroy another American flag shipline who was not so subsidized. Section 810 of the Merchant Marine Act (46 USC § 1227) states unequivocally that no subsidy of any kind will be paid to a contractor who violates that section whose wording was incorporated in each and every contract in 1965-1966 when US Lines was found to have acted in concert with others to drive Safir's company out of business.

20. Affiant Safir was the intended third-party beneficiary of the Section 810 clause in the US Lines contract. This Circuit has very clearly followed *Archawski* v *Hanioti* 350 US 532 (155) when it came to the application of restitutionary principles in admiralty where it recognized that quasi contractual claims may be considered by federal courts if they arise out of maritime contracts. *Peninsular and Oriental etc.* v *Overseas Oil Carriers,* 553 F2d 830, 835 (2nd Cir 1977) see also *Greenslate* v *Tenneco Oil,* 623 F. Supp. 573 (EDLa 1985); *Sword Line* v *United States,* 230 F2d 75 (2nd Cir 1956).

The Safir lien was a priming preferred maritime lien claim

because it arose prior to the recording and endorsement of the Prudential $92,000,000.00 mortgage as amended in 1986. Se Gilmore & Black Chap. IX Maritime Liens and Ship Mortgages § 9-71, p. 755. The constructive trust arose with the judgment of *Safir* v *Klutznick*, 526 F. Supp. 921 (DDC 1981) as modified in *Safir* v *Dole*, 718 F2d 475 (DC Cir 1983) cert denied. See *In the Matter of Frenville* 744 F2d 332, 336-337 (3rd Cir 1984). In Admiralty the claim is traceable to the res, the vessels lacquired and operated with the fruits of unjust enrichment. *Matter of Weis Securities*, 605 F2d 590, 597 (2nd Cir 1978).

21. For the reasons set forth herein and for those set forth in the accompanying verified complaint affiant prays that his motion to intervene be granted.

Dated: New York, New York
June 2, 1989

/s/
MARSHALL SAFIR
271 Grand Central Pky.
Floral Park, New York 11005
(516) 225-0210

Sworn to before me this
day of June 1989.
/s/
George F. Diffendale
Notary Public, State of New York
No. 41-4938775
Qualified in Queens County